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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976.

No. 76-906

UNITED AIR LINES, INC.,

Petitioner,

vs.

HARRIS S. McMANN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

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INDEX.

	PAGE
Opinions Below	1
Jurisdiction	2
Question Presented for Review	2
Statute Involved	2
Statement of the Case	2
Reasons the Writ Should Be Granted	7
I. United's Plan Complies with the Requirements of the Exemption in Section 4(f)(2) Given Its Ordinary Meaning	9
II. The Department of Labor's Published Interpretations and Opinions Support the Proposition That Involuntary Retirements at Any Age Are Permissible as Long as the Express Language of the Act Is Followed	11
III. The Legislative History of the Act Supports the Legality of Involuntary Retirements Prior to Age 65 When Made Pursuant to a Bona Fide Pension Plan	13
IV. Other Court Decisions Have Rejected the Theory of the McMann Decision	15
Conclusion	19
Appendix:	
Order of the District Court Dated September 2, 1975 Granting Summary Judgment to United	A1
Order and Opinion of the Court of Appeals for the Fourth Circuit Dated October 1, 1976 Reversing and Remanding the Case	A5

Table of Authorities.

Cases.

Brennan v. Taft Broadcasting Co., 500 F. 2d 212 (5th Cir. 1974) 6, 8, 9, 15, 16

Camden Trust Co. v. Gidney, 301 F. 2d 521 (D. C. Cir. 1962) 10

Dunlop v. General Telephone Co., ... F. Supp. ....., 13 FEP Cases 1210, appeal docketed, No. 76-2371 (9th Cir. 1976) 18

Dunlop v. Hawaiian Telephone Co., 415 F. Supp. 330 (D. Haw. 1976) 17

General Electric v. Gilbert, *et al.* U. S. ....., 45 U. S. L. W. 4031 (1976) 12

Griggs v. Duke Power Co., 401 U. S. 424 (1971) 12

Grossfield v. Saunders Co., ... F. Supp. ....., 1 FEP Cases 624 (S. D. N. Y. 1968) 19

Hodgson v. American Hardware Mutual Ins. Co., 329 F. Supp. 225 (D. Minn. 1971) 12

de Lorraine v. MEBA Pension Trust, *et al.*, 499 F. 2d 49 (2nd Cir. 1974) 8, 17

Los Angeles Fisheries v. Crook, 47 F. 2d 1031 (9th Cir. 1931) 10

McGovern v. United Air Lines, Inc., ... F. Supp. ....., Civil Action No. 75C309 (N. D. Ill. 1975) 19

McKinley v. Bendix Corporation, 420 F. Supp. 1001 (W. D. Mo. 1976) 19

Steiner v. National League of Professional Baseball Clubs, 377 F. Supp. 945 (C. D. Cal. 1974), *aff'd.* No. 74-2604 (9th Cir. 1975) 8, 17

Stringfellow v. Monsanto Co., 320 F. Supp. 1175 (W. D. Ark. 1970) 19

Walker Manufacturing Co. v. Industrial Commission, 27 Wis. 2d 669, 135 N. W. 2d 307 (Sup. Ct. 1965) 10

Articles.

69 Monthly Labor Review 41 (April 1973) ..... 7(n.8)

Statute.

Sections 4(a) [29 U. S. C. § 623(a)] and 4(f) [29 U. S. C. § 623(f)] of the Age Discrimination in Employment Act of 1967 (29 U. S. C. § 621 *et seq.*) A14

Interpretative Regulation.

Title 29, CFR "Labor", Chapter V—"Wage and Hour Division, Department of Labor", Supchapter C—"Age Discrimination in Employment," Section 860.110 "Involuntary Retirement Before Age 65" A15

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UNITED AIR LINES, INC.,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

Petitioner United Air Lines, Inc. (hereinafter "United") respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered October 1, 1976 in Case No. 75-2206, *Harris S. McMann* v. *United Air Lines, Inc.*

OPINIONS BELOW.

The Opinion of the District Court for the Eastern District of Virginia, Alexandria Division, dated September 2, 1975, is not officially reported. A copy appears in the Appendix hereto at page A1. The Opinion of the Court of Appeals for the Fourth Circuit, dated October 1, 1976, is reported at 542 F. 2d 217. A copy appears in the Appendix at page A5.

JURISDICTION.

The judgment of the Court of Appeals was entered October 1, 1976. Jurisdiction is conferred on this Court by 28 U. S. C. § 1254(1).

QUESTION PRESENTED FOR REVIEW.

Is the involuntary retirement of an employee prior to age 65 in observance of the terms of a bona fide retirement plan adopted many years prior to passage of the Act permissible without further justification where the Act expressly provides that it is not unlawful for an employer ". . . to observe the terms of a bona fide . . . retirement . . . plan which is not a subterfuge to evade the purposes of . . ." the Act?

STATUTE INVOLVED.

The Age Discrimination in Employment Act of 1967, as amended,[1] 29 U. S. C. § 621 *et seq.* (hereinafter, "ADEA" or the "Act"), specifically Section 4(f)(2) thereof (29 U. S. C. § 623(f)(2)) which reads as follows:

> "It shall not be unlawful for an employer, employment agency, or labor organization . . . to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter, except that no such employee benefit plan shall excuse the failure to hire any individual."

STATEMENT OF THE CASE.

This is an action brought by Mr. Harris S. McMann (hereinafter "McMann"), a retired former employee of United Air

1. The Act was amended April 8, 1974 by the Fair Labor Standards Amendments of 1974 (Public Law 93-259, 88 Stat. 55). The 1974 amendments, however, involve changes irrelevant to this case.

Lines, Inc. (hereinafter "United") requesting injunctive relief, reinstatement and back pay under the Act as a result of his involuntary retirement by United at age 60 in observance of the terms of a retirement income plan covering him and other employees in his job classification.

The facts were stipulated. McMann was born January 23, 1913 and hired by United April 14, 1944. While with United he held various jobs, his final position at the time of retirement being that of "Technical Specialist—Aircraft Systems", a management position.

When McMann was hired by United in 1944, United had in existence a formal retirement income plan (hereinafter the "Plan") which provided retirement benefits to employees who were eligible to join and who became members of the Plan.[2] These benefits were provided through a group annuity contract entered into between United and two insurance companies. McMann had opportunity to join the Plan on various occasions after he became an employee, but chose not to do so until 1964.

On January 23, 1964, McMann elected for the first time to join the Plan and signed an application card applying to enter the Plan effective February 1, 1964. Thereafter, McMann was sent annual statements concerning the benefits he had accrued under the Plan, each such statement showing that his retirement would occur at age 60.

On January 23, 1973, McMann reached his 60th birthday. On February 1, 1973, the first day of the month following his 60th birthday, McMann was retired in observance of the Plan and commenced to collect retirement benefits.

Shortly before his retirement, McMann served notice on the Secretary of Labor of his intent to sue based upon United's alleged violation of the Act in requiring him to retire at age 60.[3]

2. The Plan was adopted in 1941.

3. McMann, although a management employee at the time of his retirement, held a place on the pilots' seniority roster as a result

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A representative of the Secretary of Labor, Mr. Robert E. Ferguson, Area Director, U. S. Department of Labor, Richmond, Virginia, met and conferred with representatives of McMann and United in investigating McMann's complaint. Subsequent to these conferences, Mr. Ferguson wrote United's representative on January 18, 1973 stating as follows:

> "This is in further reference to the above styled matter insofar as the Age Discrimination in Employment Act of 1967 is concerned.
>
> Following my conference with you in this office and my earlier conference with Mr. Francis G. McBride, Attorney for Mr. McMann, I referred the issue of your company's pending involuntary retirement of Mr. McMann, to be effective February 1, 1973, to our Regional Attorney at Nashville, Tennessee.
>
> Regional Attorney Marvin Tincher has now advised that the retirement plan of your company is a bona fide employee benefit plan within the meaning of Section 4(f)(2) of the Age Discrimination in Employment Act. Further, he has held, that since the plan was adopted many years prior to the effective date of the indicated Act, it would not appear that the plan is a subterfuge to evade the purposes of the Act.
>
> In view of the above, this office contemplates no further action with respect to this matter and has advised Mr. McBride to that effect and that we are closing our file. Should you have any questions relative to the above, please feel free to write this office."

On January 31, 1975, McMann filed this lawsuit in the U. S. District Court for the Eastern District of Virginia, Alexandria Division. In essence, McMann asserted that his involuntary

(Continued from preceding page)

of his holding a union-covered position earlier. In addition to protesting his planned retirement to the Secretary of Labor, McMann filed a grievance under the Pilots' collective bargaining Agreement protesting his involuntary retirement as a breach of the Agreement. The System Board of Adjustment, with Professor Archibald Cox sitting as neutral, denied his grievance without prejudice to McMann's right to pursue his remedy under the Act.

retirement on his 60th birthday constituted an act of age discrimination and was unlawful under the Act. The Complaint requested injunctive relief, reinstatement and back pay. United filed its Answer on March 7, 1975 admitting it retired McMann on his 60th birthday, but raising the defense that McMann was retired at age 60 in accordance with the terms of a *bona fide* employee benefit plan within the meaning of Section 4(f)(2) of the Act and Section 860.110 of the Secretary of Labor's interpretation of the Act.[4]

On July 15, 1975, United and the plaintiff, McMann, entered into a stipulation of the facts. Based thereon, both parties moved for summary judgment on July 25, 1975. On August 1, 1975, the matter came before the District Court and oral arguments were presented. On September 2, 1975, the District Court, Judge Albert V. Bryan, Jr. presiding, granted United's motion for summary judgment and denied McMann's motion. McMann appealed this decision to the Court of Appeals for the Fourth Circuit.

In the Court of Appeals, the Secretary of Labor entered the case by filing a brief *amicus curiae*. McMann's position before the Court of Appeals remained essentially the same; namely, that United's action in requiring him to retire at age 60 constituted a violation of the Act in that he was a member of the "protected" age group under the Act and that the purpose of the Act would allegedly be frustrated if United could utilize his membership in the Plan as a means of terminating his active employment at age 60.[5] The Secretary of Labor joined in McMann's position.

4. Section 860.110 reads in relevant part as follows:

> ". . . the Act authorizes involuntary retirement irrespective of age, provided that such retirement is pursuant to the terms of a retirement or pension plan meeting the requirements of 4(f)(2). * * *"

5. McMann also argued that United's Plan did not by its terms provide for *mandatory* retirement at age 60 since it provided for *normal* retirement at age 60. The arbitration award of the System Board of Adjustment (discussed in footnote 3, *supra*), however,

(Continued on next page)

United maintained, on the other hand, that the District Court's decision was correct because the Act expressly permits, as an exception to the provision against age discrimination, an employer to ". . . observe the terms of any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this Act. . . ." United pointed out that its retirement income plan, which provided for retirement at age 60, was a *bona fide* plan paying substantial benefits and since it was instituted many years prior to enactment of the Age Discrimination Act of 1967, it could not possibly be considered a "subterfuge to evade" the purposes of that Act. United relied upon the clear and unambiguous language of § 4(f)(2), the Secretary of Labor's published interpretive regulations and guidelines regarding § 4(f)(2), and the decision of the Court of Appeals for the Fifth Circuit in the case of *Brennan* v. *Taft Broadcasting Co.*, 500 F. 2d 212 (5th Cir. 1974) as well as other decisions discussed hereinafter, as authority for its position.

Following oral arguments on June 10, 1976, the Court of Appeals in *McMann* rendered a decision on October 1, 1976 in which it explicitly rejected the *Taft* decision and ruled that it is not enough that a retirement benefit plan be *bona fide* and in existence for years prior to the Act. In essence, the Court held that any retirement plan which contains a provision for mandatory retirement earlier than age 65 must be presumed "a subterfuge to evade the purposes" of the Act; that in order to escape condemnation as a "subterfuge," the employer must prove that ". . . [t]here [is] some reason other than age for a plan, or a provision of a plan which discriminates between employees of different ages." (542 F. 2d at 220). Although recognizing that it would be extremely unlikely that United or

(Continued from preceding page)

rejected this same argument, pointing out that the established practice at United had been to treat the normal retirement date as a mandatory retirement date. The Court of Appeals also rejected this argument.

any employer could demonstrate an economic[6] or business[7] justification for a mandatory retirement age prior to 65, the Court of Appeals remanded the case to the District Court to permit such a showing. United then filed this Petition for a Writ of Certiorari.

REASONS THE WRIT SHOULD BE GRANTED.

Conservatively, at least one million workers in the United States are members of retirement plans which provide for mandatory retirement at an age earlier than 65.[8] Clearly, the decision in *McMann*, if permitted to stand, places such plans in probable violation of the Act. Until this Court resolves the question, numerous employers face uncertainty as to the validity of their retirement plans.

The *McMann* decision is without precedent in holding that an admittedly *bona fide* retirement plan in existence for many years prior to passage of the Act will nevertheless be deemed a subterfuge to evade the purposes of the Act if it provides for

6. In connection with an economic justification, the Court of Appeals observed that "Ordinarily, postponement of retirement results in cost savings to a plan providing retirement benefits . . . Savings come from two sources. Mortality before retirement eliminates or reduces the benefits payable. In addition, the higher retirement age shortens the period during which benefits will be paid to retiree's." (542 F. 2d at 222 and n. 8).

7. The only business justification suggested by the Court of Appeals for a mandatory retirement age prior to 65 is "where age is a 'bona fide' occupational qualification." (542 F. 2d at 219, n. 3) That situation is, of course, explicitly provided for in another exception to the Act, § 4(f)(1), 29 U. S. C. § 623(f)(1) and, therefore, the Court's interpretation would make § 4(f)(2) redundant and meaningless.

8. Source: 69 Monthly Labor Review 41, 43 (April, 1973). The decision of the Court of Appeals in *McMann*, relying upon the *amicus curiae* brief filed by the Secretary of Labor, indicates that ". . . there are over eleven million employees who are members of retirement plans which require retirement before age 65 and there are another several million who are members of plans which permit forced retirement before age 65." (542 F. 2d at 222).

mandatory retirement at an age earlier than 65, unless the employer also proves some economic or business purpose for such early retirement. Indeed, the *McMann* decision is in direct conflict with the decisions of three circuit courts which have concluded that a *bona fide* retirement plan long predating the Act could not be a subterfuge to evade the Act, *i.e., Brennan* v. *Taft Broadcasting Co., supra, de Lorraine* v. *MEBA Pension Trust, et al.*, 499 F. 2d 49 (2nd Cir. 1974) and *Steiner* v. *National League of Professional Baseball Clubs*, 377 F. Supp. 945 (C. D. Cal. 1974), *aff'd.*, No. 74-2604 (9th Cir., Oct. 15, 1975).[9]

The *McMann* decision overrides the plain, unambiguous language of the exemption for retirement plans provided for in Section 4(f)(2) of the Act and does so despite the presence of legislative history which establishes that involuntary retirements under existing bona fide retirement plans were intended to be protected by the exemption. Moreover, the decision in *McMann* represents a complete departure from prior interpretations and regulations issued by the Department of Labor contemporaneously with the Act and which remain in effect today.

As a result, employers subject to the ADEA are currently acting at their peril by following the Secretary's Interpretations —unaware that in litigation his position has changed. Until this court resolves the matter, the uncertainty as to the meaning of the Section 4(f)(2) exemption and the conflict in the circuits will continue.

9. The decision was affirmed by the Ninth Circuit under its Local Rule 21(c) which provides that such "disposition . . . shall not be regarded as precedent and shall not be cited to or by this court or any district court of the Ninth Circuit."

ARGUMENT.

I.

United's Plan Complies with the Requirements of the Exemption in Section 4(f)(2) Given Its Ordinary Meaning.

Section 4(a) of the Act prohibits age discrimination among employees in the protected (age 40-65) group by stating in relevant part as follows:

> Sec. 4(a). It shall be unlawful for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age.

Section 4(f)(2) of the Act exempts certain employer actions from the requirements of Section 4(a) by providing as follows:

> Sec. 4(f). It shall not be unlawful for an employer . . .—
>
> (2) to observe the terms of . . . any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this Act, execpt that no such employee benefit plan shall excuse the failure to hire any individual . . ."

Given their ordinary meaning, the words "to observe the terms of" which appear in the exemption permit an employer to apply or implement the provisions of his retirement plan. A *"bona fide"* plan is by definition one which is made in good faith without fraud or deceit and which is not specious or counterfeit. As stated by the Fifth Circuit in *Taft, supra,* the term *bona fide* is synonymous with "genuine" or "authentic" (500 F. 2d at 217). A "subterfuge" is by definition "deception by artifice or strategem to conceal, escape, avoid or evade," the

word "evade" meaning to use "craft or strategem in avoidance" (Merriam Webster's Third New International Dictionary, Unabridged). Judicially, "subterfuge" has been defined as "a device, plan, or the like, to which one resorts for escape or concealment; an artifice employed to escape censure or the face of an argument, or to justify opinions or conduct; an evasion." See *Camden Trust Co.* v. *Gidney*, 301 F. 2d 521, 523 (D. C. Cir. 1962); *Los Angeles Fisheries* v. *Crook*, 47 F. 2d 1031, 1035 (9th Cir. 1931). The term "subterfuge" implies a purposeful intent to circumvent or evade.

United's Plan clearly meets the definition of *"bona fide"* and, just as clearly, is not a "subterfuge to evade" the purposes of the Act. United's plan, which McMann and the Secretary of Labor concede is *"bona fide,"* was entered into in 1941 in good faith without fraud or deceit. It provides for and has paid substantial retirement benefits to a broad class of workers and it is neither "specious" nor counterfeit. Further, since it was entered into over twenty-five years before the Act was passed, the Plan could not be a "subterfuge to evade" the Act or its purposes. One cannot create a device to "evade" that which does not exist.

Although both the terms *"bona fide"* and "not a subterfuge to evade" are used in Section 4(f)(2), they realistically do not appear to have separate meanings. The Wisconsin Supreme Court noted this fact in analyzing state age discrimination laws some of which, like those in Wisconsin and New York, permit employers to retire employees in observance of the terms of retirement plans which are not "subterfuges" and others which permit employers to retire employees in observance of the terms of *"bona fide"* plans. The Wisconsin Court concluded in the case of *Walker Manufacturing Co.* v. *Industrial Commission*, 27 Wis. 2d 669, 135 N. W. 2d 307, 315 (Sup. Ct. 1965) that:

> "We are satisfied that there is no essential difference between an age discrimination statute proviso phrased in terms of retirement policies or systems that are not a subterfuge, such as contained in [Wisconsin law] . . . and the corresponding provisions of age discrimination statutes which speak in terms of 'bona fide' retirement or pension plans."

Since United's Plan is conceded to be *"bona fide"* in this case, it logically follows that it cannot be a "subterfuge" to evade the purposes of the Act.

II.

The Department of Labor's Published Interpretations and Opinions Support the Proposition That Involuntary Retirements at Any Age Are Permissible as Long as the Express Language of the Act Is Followed.

The Wage and Hour Administrator of the Department of Labor, who is charged with administering the Act, issued interpretations of the Act starting on June 18, 1968, six days after the Act became effective, which interpretations were published in the Federal Register and codified at 29 CFR § 860 *et seq.* In relevant part, as amended in 1969, the interpretations read as follows:

> *"Sec. 860.110 Involuntary Retirement before age 65*—(a) Section 4(f)(2) of the Act provides that 'It shall not be unlawful for an employer, employment agency, or labor organization * * * to observe the terms of * * * any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this Act, except that no such employee benefit plan shall excuse the failure to hire any individual * * *.' Thus, the Act authorizes involuntary retirement irrespective of age, provided that such retirement is pursuant to the terms of a retirement or pension plan meeting the requirements of 4(f)(2). The fact that an employer may decide to permit certain employees to continue working beyond the age stipulated in the formal retirement program does not, in and of itself, render an otherwise bona fide plan invalid insofar as the exception provided in Section 4(f)(2) is concerned.***"

Opinions issued by the Department of Labor's Wage-Hour Administrator have consistently reiterated this position. For example, in an opinion letter dated November 15, 1968, the Administrator stated:

> "This exception [§ 4(f)(2)] does not apply, however, to the involuntary retirement before age 65 of employees who are not participants in the employer's pension programs. *Thus, for example, in the case of employees who are participants in your client's pension plan, such employees may be retired involuntarily before age 65, but employees who are not participants in the plan may not be so retired.* Opinion ADEA 100, Nov. 15, 1968 (Emphasis added.)

It is significant to note that no official, published interpretation or opinion issued by the Administrator indicates that the words of Section 4(f)(2) have other than their ordinary meaning. Nowhere does the Administrator state in his official publication or opinions that in order for an involuntary retirement provision of a plan to meet the requirements of Section 4(f)(2), that provision must be shown to be based on business or economic factors. It was not until cases involving involuntary retirements were in litigation and in recent reports to Congress that this new definition of a "subterfuge to evade" the purposes of the Act was revealed—and then not in the context of official, published interpretations, but rather in court documents or reports to Congress. In fact, those provisions of the Interpretative Bulletin quoted above remain the Administrator's officially published Interpretations to this very day.

It is generally recognized that the interpretations of a statute by the agency empowered to administer that statute are normally entitled to great deference *Griggs* v. *Duke Power Co.*, 401 U. S. 424, 434-35 (1971) and *Hodgson* v. *American Hardware Mutual Ins. Co.*, 329 F. Supp. 225, 228-9 (D. C. Minn. 1971); however, as this Court made clear in its recent decision in *General Electric* v. *Gilbert, et al,* ..... U. S. ....., 45 U. S. L. W. 4031, 4036 (1976), a second interpretation contradicting an earlier one issued contemporaneously with the enactment of the statute is not entitled to "high marks" and this

Court has appropriately declined in the past to defer to administrative guidelines where they conflicted with earlier pronouncements of the agency. In the case at hand, the position newly enunciated by the Secretary of Labor to the Courts and Congress clearly interprets Section 4(f)(2) differently than its original interpretation issued contemporaneously with the Act. The Fourth Circuit, in accepting the second "interpretation" rather than the earlier interpretation improperly accorded undue weight to such "interpretation."

III.

The Legislative History of the Act Supports the Legality of Involuntary Retirements Prior to Age 65 When Made Pursuant to a Bona Fide Pension Plan.

In his *amicus curiae* brief to the Court of Appeals in *McMann*, the Secretary asserted that ". . . involuntary retirement was never once mentioned during the Congressional debates." (Secretary's brief, p. 19). Contrary to this assertion, the legislative history establishes that involuntary retirements were discussed and in fact intended to be covered by the Section 4(f)(2) exemption.

The bill introduced by the Administration (Senate Bill 830, 90th Congress, 1st Session 1967) was introduced on February 3, 1967 by Senator Yarborough. It provided in Section 4(f) that:

> "It shall not be unlawful for an employer, employment agency, or labor organization—
>
> (2) To *separate involuntarily an employee under a retirement policy* or *system* where such *policy* or *system* is not merely a subterfuge to evade the purposes of this Act . . ." (Emphasis added).

Secretary Wirtz testified at the Senate Hearings on the effect of the exemption in the Administration Bill:

> "Mr. Secretary, in your opinion, what will be the effect of this legislation on the many private pension and insurance plans now in effect?

> Secretary WIRTZ. It would be my judgment, Senator Fannin, that the effect of the provision in section 4(f)(2) which appears on page 6 is to protect the application of almost all plans which I know anything about.
>
> There is that problem specifically recognized and it is provided in that section that 'It shall not be unlawful to separate involuntarily an employee under a retirement system where such policy or system is not merely a subterfuge to evade the purposes of that act.'
>
> It is intended to protect retirement plans." Senate Hearings at 53.

Senator Javits, the Senator from New York, expressed concern during the Senate hearing on the Bill that the exemption in the Administration's Bill did not go far enough—that in addition to involuntary retirement, it should be broad enough to exempt an employer from the requirement that he add a newly hired older worker to his retirement or pension plan. As stated by Senator Javits:

> "We must also be sure that the law which is passed does not in practice encourage rather than discourage discrimination against older workers. One of the problems which must be faced in this connection concerns the operation of established pension plans, some of which provide benefits based to a certain extent on the age of the employee when first hired.
>
> *"The Administration bill, which permits involuntary separation under bona fide retirement plans meets only part of the problem.* It does not provide any flexibility in the amount of pension benefits payable to older workers depending on their age when hired, and thus may actually encourage employers, faced with the necessity of paying greatly increased premiums, to look for excuses not to hire older workers when they might have done so under a law granting them a degree of flexibility with respect to such matters."[10]

10. Hearings on S. 830 before Subcommittee on Labor of the Committee on Labor and Public Welfare, 90th Cong. 1st Sess. at 24 (1967) (prepared statement) (Emphasis added).

To meet these needs, Senator Javits proposed:

> ". . . that a fairly broad exemption be provided for bona fide retirement and seniority systems which will facilitate hiring rather than deter it and make it possible for older workers to be employed without the necessity of disrupting those systems." [11]

The Subcommittee referred the Administration Bill with suggested changes to the full Committee and on November 4, 1967, an amendment in the nature of a substitute to the Administration Bill was reported by the Committee. This became the amended S. 830, the Senate Committee Bill, which was subsequently enacted into the Act.

It is apparent from the testimony of Senator Javits, above, that he *agreed with* the Administration's concept of permitting the involuntary retirement of employees under a retirement policy or system, but he wanted to *broaden* that exemption. Section 4(f)(2), as enacted, represents the *broadened* exemption and by its very terms permits an employer to observe the terms of a retirement plan in *all* its aspects, *including* involuntary retirements at any age pursuant to such a plan.

IV.

Other Court Decisions Have Rejected the Theory of the McMann Decision.

The leading decision on the matter of involuntary retirements under the Act is the decision rendered by the Court of Appeals for the Fifth Circuit in *Brennan* v. *Taft Broadcasting Co., supra.* In *Taft*, a 47 year old employee joined his employer's retirement plan in 1963. That plan required members to retire at age 60, the normal retirement age. In June, 1970, at which time the employee reached his 60th birthday, he was involuntarily retired. Thereafter, suit was filed under the Act seeking injunctive relief and damages as a result of his forced retirement. The District Court ruled against him and the Court of Appeals affirmed its judgment.

11. *Id.* at 28 (extemporaneous remarks).

In affirming the lower court's judgment, the *Taft* Court rejected the argument that the employer's plan did not come within the Section 4(f)(2) exception. The Court stated that Taft's plan was *bona fide* because it existed, was genuine and authentic and paid substantial benefits. It also stated (500 F. 2d at 215):

> "Does the defendant-appellee's 'Plan' come within the terms and purposes of the Section 4(f)(2) exception?
>
> "We respond in the affirmative.
>
> "Taft's 'Plan' was instituted in 1963. Jones exercised his option to participate in 1963. The Act was approved December 15, 1967. Quite obviously, Congress sought to avoid legal and constitutional problems likely to arise from any ex post facto effort to invalidate existing employee benefit plans. Consequently, it included the Section 4(f)(2) exception.
>
> "Its language is plain: 'a bona fide *employee benefit plan* such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter [emphasis ours]'. The key phrase is 'employee benefit plan.' The words, 'retirement, pension, or insurance,' are added in a clearly description sense, not excluding other kinds of employee benefit plans if, conceivably, there could be any.
>
> "Taft's 'Plan' was effectuated far in advance of the enactment of the law, eliminating any notion that it was adopted as a subterfuge for evasion."

The Court in *Taft* also rejected the argument that the Section 4(f)(2) exception was available only if there was a "cost" impact on the employer, as urged by the Secretary of Labor. As stated by the *Taft* Court (500 F. 2d at 217):

> "The primary difficulty [with this approach] is that it attempts to use legislative history to override the unambiguous language of the statute."

The *Taft* Court pointed out that "the statutory language should serve the function of indicating prohibited conduct and

that it is 'hardly reasonable' to require persons affected by legislation to delve into voluminous and conflicting collections of speeches to determine "whether what a statute plainly says is what it really means" (*Id.* at 217).

In *de Lorraine* v. *MEBA Pension Trust*, 499 F. 2d 49 (2nd Cir. 1974), a case decided approximately three months before *Taft*, the Second Circuit Court of Appeals stated: (499 F. 2d at 50):

> "The Age Discrimination in Employment Act provides that it shall not be unlawful for a labor organization 'to observe the terms of . . . any bona fide employee benefit plan such as a . . . pension . . . plan, which is not a subterfuge to evade the purposes of this chapter. . . .' 29 U.S.C. § 623(f)(2). MEBA Pension Trust was established in 1955, long before the passage of the Act, and pays substantial benefits to a broad class of workers. *Thus, the trust is certainly not itself a subterfuge to evade the purposes of the statute. . . .*" (Emphasis added.)

And in *Steiner* v. *National League of Professional Baseball Clubs*, 377 F. Supp. 945 (C. D. Cal. 1974), *affirmed* No. 74-2604 (9th Cir., Oct. 15, 1975), the plaintiff baseball umpire contended that the retirement income plan for umpires which called for retirement at age 55 was a subterfuge to avoid the purposes of the Act. Rejecting this contention, the District Court stated (377 F. Supp. at 948):

> "Of course, this Retirement Plan was put into practice long before there was any proscription against employment practices where discrimination because of age was found. *Obviously it could not have been evolved in an attempt to circumvent any public policy or law.*"

In *Dunlop* v. *Hawaiian Telephone Co.*, 415 F. Supp. 330 (D. Haw. 1976), appeal docketed, No. 76-..... (9th Cir. 1976), the Court upheld the involuntary retirement of an employee who was covered by a retirement plan providing for retirement at age 60. The Court ruled that the plan in question was a *bona fide* employee benefit plan within the meaning of Section 4(f)(2)

and was not a subterfuge to evade the purpose of the Act because the plan was one which paid substantial benefits.

And in *Dunlop* v. *General Telephone Co.*, ____ F. Supp. ....., 13 FEP Cases 1210, appeal docketed, No. 76-2371 (9th Cir., 1976), the Secretary of Labor filed suit alleging that the defendant telephone company's action in involuntarily retiring seven employees prior to age 65 in accordance with the terms of a retirement plan violated the Act. In that case, the right of defendant unilaterally to retire salaried employees who were eligible for early retirement had been in the Plan continuously since 1929. Whether employees were retired early or not made no material difference in the financing of the Plan. The Secretary of Labor conceded that the plan in question was not a subterfuge to evade the purposes of the Act. The District Court found for the defendant stating, in relevant part in its conclusions of law that (13 FEP Cases at 1212-13):

> "6. The Section 4(f)(2) exception is clear and unambiguous and legislative history may not be used to override the plain meaning of the statutory exception . . ." (citing *Taft* and *Steiner*)
>
> "7. In any event, neither the language of the statute nor the legislative history of the statutory exception support plaintiff's theory that the exception narrowly be limited to only those pension plans which would suffer a financial burden should the exceptions not apply to them.
>
> "8. The . . . Plan . . . which is both authentic and genuine, is bona fide within the meaning of the Section 4(f)(2) exceptions of the Age Discrimination in Employment Act of 1967 . . ." (citing *Brennan*)
>
> • • • • •
>
> "10. Plaintiff admits, and the Court so finds, that the . . . Plan . . . is not a subterfuge to evade the purposes of the Age Discrimination in Employment Act of 1967.
>
> "11. The . . . Plan . . . falls within the Section 4(f)(2) exception and defendant's retirement of the seven individuals was not unlawful and did not violate the Age Discrimination in Employment Act of 1967, 29 U. S. C. § 621, et seq."

In *McGovern* v. *United Air Lines, Inc.*, ... F. Supp. ....., Civil Action 75 C 309 (N. D. Ill. 1975), a case involving a United Flight Navigator involuntarily retired at age 60 pursuant to United's retirement income plan, the plaintiff Navigator made essentially the same arguments concerning his retirement being a violation of the Act as did McMann. The District Court rejected these arguments, stating, in relevant part, that (Slip Opinion, p. 6):

> ". . . The normal retirement date for flight navigators under the plan . . . has been age 60 since 1948. It is clear from this chronology that the plan in question substantially predates the Age Discrimination Act of 1967. We hold, accordingly, that it is a bona fide plan which was not adopted to evade the purposes of the Act."

See, also, *McKinley* v. *Bendix Corporation*, 420 F. Supp. 1001 (W. D. Mo. 1976), *Stringfellow* v. *Monsanto Co.*, 320 F. Supp. 1175 (W. D. Ark. 1970) and *Grossfield* v. *Saunders Co.*, ____ F. Supp. ____, 1 FEP Cases 624 (S. D. N. Y. 1968).

CONCLUSION.

For the reasons stated above, United respectfully requests this Court to grant its petition for a Writ of Certiorari to the Court of Appeals for the Fourth Circuit.

Respectfully submitted,

ARNOLD T. AIKENS,
KENNETH A. KNUTSON,
EARL G. DOLAN,
Attorneys for Petitioner.

December 30, 1976.

APPENDIX.

IN THE UNITED STATES DISTRICT COURT,
For the Eastern District of Virginia,
Alexandria Division.

HARRIS S. McMANN,
Plaintiff,
vs.
UNITED AIR LINES, INC.,
Defendant.

Civil Action
No. 72-75-A

ORDER GRANTING SUMMARY JUDGMENT.

This matter having come on for hearing before the Court on August 1, 1975, on cross-motions for summary judgment, the Court having read and considered the pleadings and having heard oral argument of counsel for the respective parties makes the following findings of fact as stipulated to by the parties:

FINDINGS OF FACT.

1. Defendant is and at all times material hereto has been an Employer within the meaning of the Age Discrimination in Employment Act of 1967.

2. Plaintiff was born on January 23, 1913.

3. Plaintiff was hired by Defendant on April 14, 1944 and served Defendant in various capacities, most recently as a "Technical-Specialist—Aircraft Systems."

4. At the time Plaintiff was hired by Defendant on April 14, 1944, Defendant had in existence a formal retirement income plan (hereinafter referred to as the "Plan") which pro-

vided for benefits to employees who joined the Plan. These benefits were arranged through a group annuity contract issued jointly by Connecticut General and John Hancock Mutual Life Insurance Companies.

5. Participation in the Plan by employees was purely voluntary.

6. From time to time during his employment, prior to 1964, Plaintiff was given opportunity to join the Plan, but elected not to do so. On December 18, 1950, Plaintiff signed a card acknowledging that he was offered opportunity to join the Plan and declined.

7. On January 23, 1964, Plaintiff elected for the first time to participate in the Plan as applicable to non-union flight employees and signed an application card applying to join the Plan effective as of February 1, 1964. The application card signed by Plaintiff shows on its face that the normal retirement age for employees in his classification was age 60.

8. In 1965, employees in Plaintiff's job classification were transferred from that part of the Plan applicable to non-union flight employees to that part of the Plan applicable to union flight employees. No change was made in the normal retirement age of 60 as applicable to Plaintiff.

9. Plaintiff was retired on the first day of the month following the date of his 60th birthday; *i.e.*, he was retired on February 1, 1973.

10. On an annual basis from the time he joined the Plan in 1964 until he retired in 1973, Plaintiff received a statement showing his estimated benefits under the Plan at the time of his retirement. In each statement sent to him in each year from 1964 until 1973, reference was made—and his estimated earnings were calculated—on a retirement age of 60.

11. From time to time Defendant sends to its employees information booklets describing the salient features of the Plan as applicable to them. Plaintiff was among those sent copies

of the booklets describing the Plan. In each case, the booklet sent Plaintiff described the normal retirement age as age 60.

12. Plaintiff has collected benefits under the Plan since his retirement on February 1, 1973. These benefits varied in amount depending on the value of the units in the Plan.

13. In March, 1973, Plaintiff was given supplemental payments by Defendant.

14. Plaintiff filed a grievance with the Defendant claiming his involuntary retirement violated provisions of the Pilots' collective bargaining agreement. His grievance was denied in arbitration.

15. Plaintiff filed notice of intent to sue Defendant with the Secretary of Labor pursuant to the Age Discrimination in Employment Act of 1967. Following conferences between representatives of the Department of Labor and attorneys for Plaintiff and Defendant, the Department's regional attorney wrote Plaintiff and Defendant and advised the parties that the retirement income plan of Defendant "is a bona fide employee plan within the meaning of Section 4(f)(2) of the Age Discrimination in Employment Act."

16. Plaintiff filed his notice of intent to sue Defendant more than 60 days prior to the commencement of his lawsuit.

17. That the plaintiff was covered by the Age Discrimination in Employment Act of 1967, 29 USC § 621 *et seq.* amended by P. L. 90-202 effective May 1, 1972.

18. Title 29 USC § 623(f)(2) expressly provides that it shall not be unlawful for any employer:

> ". . . to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this Act, except that no such employee benefit plan shall excuse the failure to hire any individual."

19. Plaintiff was retired in accordance with the terms of such a bona fide benefit plan within the meaning of Title 29 USC § 623(f)(2).

Accordingly, the Court concludes as follows:

CONCLUSIONS OF LAW.

1. That there are no material issues of fact and defendant, United Air Lines, Inc., is entitled to judgment as a matter of law.

ORDER.

It therefore this 2nd day of September, 1975,

ORDERED, That the plaintiff's motion for summary judgment be and the same hereby is denied and it is further,

ORDERED, That the defendant's motion for summary judgment be and the same is hereby granted and it is therefore,

ORDERED, That the Complaint herein be and the same hereby is finally dismissed.

[Illegible]
Judge.

CERTIFICATE OF SERVICE.

I hereby certify that a copy of the foregoing Order was mailed, postage prepaid, to Francis G. McBride, Esquire, Attorney for Plaintiff, Suite 911, 7900 Westpark Drive, McLean, Virginia 22101, this 13th day of August, 1975.

/s/ JOSEPH A. RAFFERTY, JR.
Joseph A. Rafferty, Jr.

UNITED STATES COURT OF APPEALS,
For the Fourth Circuit.

No. 75-2206

HARRIS S. McCANN,
Appellant,

vs.

UNITED AIR LINES, INC.,
Appellee.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Albert V. Bryan, Jr., District Judge.

Argued June 10, 1976—Decided October 1, 1976

Before HAYNSWORTH, *Chief Judge* and
WINTER and CRAVEN, *Circuit Judges*.

Francis G. McBride for Appellant, Carin Ann Clauss, Associate Solicitor, U. S. Department of Labor (William J. Kilber, Solicitor of Labor, Jacob I. Karro, Attorney, U. S. Department of Labor on brief) as Amicus Curiae; Joseph A. Rafferty, Jr. (Earl G. Dolan on brief) for Appellee.

WINTER, *Circuit Judge:*

This appeal presents a narrow issue: Does the Age Discrimination in Employment Act, 29 U. S. C. §§ 621, *et seq.*, proscribe the retirement of an employee at age 60 when the retire-

ment is brought about solely because of his membership in an employees' retirement plan which contains a provision making retirement mandatory at that age and when the effective date of the retirement plan preceded the effective date of the Act? The answer to the question turns on whether a preexisting pension plan which requires retirement prior to age 65 falls within the exception contained in 29 U. S. C. § 623(f)(2), "[i]t shall not be unlawful for an employer . . . to observe . . . any bona fide employees benefit plan . . . which is not a subterfuge to evade the purposes [of the Act]." The district court thought the exception applicable, relying principally on *Brennan* v. *Taft Broadcasting Co.*, 500 F. 2d 212 (5 Cir. 1974). Despite *Brennan* and other authorities, we conclude otherwise. We reverse the summary judgment awarded the employer and remand the case for further proceedings.

I.

The relevant facts are largely stipulated. McMann was hired by United Airlines (United) in 1944, and served in various capacities, most recently as a "Technical-Specialist-Aircraft Systems," until his retirement on February 1, 1973. At the time McMann was hired, United had in effect an employee retirement plan, participation in which was voluntary at the option of employee.[1] Initially, McMann decided not to join the plan. However, in 1964, he elected to participate. The application card he signed, and subsequent documents he received, showed

1. We attach no significance to the fact that McMann could have chosen not to join the plan. Realistically, an employee's decision whether or not to forego lucrative benefits, funded in part by employer contributions he would not otherwise receive, is not "voluntary" in the sense we think it would have to be in order to find a waiver of statutory protection. Moreover, we doubt that Congress intended employees and employers, either individually or in collective bargaining, to be able to waive rights granted by the Act. There is little question that an attempt to condition employment itself on the surrender of protection against discharge because of age would be legally ineffectual; we see no reason why participation in a retirement plan should be treated differently.

that the "normal retirement age" for employees in his job category was 60.

While the meaning of the word "normal" in this context is not free from doubt, counsel agreed in oral argument on the manner in which the plan is operated in practice. The employee has no discretion whether to continue beyond the "normal" retirement age. United legally may retain employees such as McMann past age 60, but has never done so: its policy has been to retire all employees at the "normal" age. Given these facts, we conclude that for purposes of this decision, the plan should be regarded as one requiring retirement at age 60 rather than one permitting it at the option of the employer.[2]

McMann was retired at age 60, in compliance with the plan. It is conceded that the plan is "bona fide" in the sense that it exists and pays benefits. United presented no evidence, however, to show that the provision of its plan requiring retirement at age 60 had any purpose other than arbitrary age discrimination. It sought and obtained summary judgment solely on the theory that since its plan was indisputably adopted prior to the effective date of the 1967 Act, (June 12, 1968) the mandatory retirement provision contained therein was not proscribed.[3]

2. If we were to treat the plan as one permitting United to retire employees at age 60 or later, at its option, we would face the situation confronted by the court in *Brennan, supra.* There, Judge Tuttle argued forcefully in dissent that, "at the very least," to qualify for the exemption early retirement pursuant to a plan would have to be *compulsory* on both the employee and the employer. 500 F. 2d at 220. Judge Tuttle drew support for this conclusion from the statutory language, "it shall not be unlawful for an employer . . . to *observe* the terms of a bona fide" plan. (Emphasis added.) Arguably, if under a plan the employer has discretion not to retire an employee, the employee's discharge is not action taken "to observe" the terms of the plan.

3. Our reversal of United's summary judgment does not finally decide this case even though most of the operative facts have been stipulated. United may have other valid defenses. For example, we note that the Act provides another exemption where age is a "bona fide occupational qualification." 29 U. S. C. § 623(f)(1). United may raise this defense on remand. Of course, we express no opinion

(Continued on next page)

II.

The Age Discrimination in Employment Act generally prohibits an employer from discharging any individual between the ages of 40 and 65 because of age. 20 U. S. C. §§ 623(a)(1), 631. However, as previously stated, 29 U. S. C. § 623(f)(2) provides an exemption from this broad rule.[4] In pertinent part, that section provides that

> [i]t shall not be unlawful for an employer . . . to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter, except that no such employee benefit plan shall excuse the failure to hire any individual. . . .

The only reported appellate decision to construe this section is *Brennan* v. *Taft Broadcasting Co.*, 500 F. 2d 212 (5 Cir. 1974), decided over a sharp dissent by Judge Tuttle.[5] The

as to its applicability to McMann, whose principal duties apparently did not involve flying airplanes, but were managerial in nature. We note, however, that the burden of proving the elements required for invocation of any statutory exemption will be on United. *Cf.* Weeks v. Southern Bell Tel. & Tel. Co., 408 F. 2d 228, 232 (5 Cir. 1969) (burden on employer to show existence of elements required for bona fide occupational qualification exception under Title VII of the Civil Rights Act of 1964.)

4. United draws our attention to the Secretary of Labor's regulation, 29 C. F. R. § 860.110, which states that "the Act authorizes involuntary retirement irrespective of age." By its terms, this regulation is interpretive, not legislative. *See* 29 C. F. R. § 860.1 (views subject to change in light of court decisions or reexamination by Department of Labor). As evidenced by the Secretary's amicus curiae brief and argument, he has now concluded that the statement in the regulations is erroneous. As we understand the Secretary's present position, it is substantially in accord with the result we reach here. Thus, the regulation has no significance for our decision. We express no opinion as to whether it may provide the basis of a defense under 29 U. S. C. §§ 259, 626(e).

5. See note 2, *supra*.

Four other reported cases have discussed the benefit plan exemption. de Loraine v. Meba Pension Trust, 499 F. 2d 49 (2 Cir.),

(Continued on next page)

Brennan majority rested its holding on a reading of the "unambiguous language of the statute," 500 F. 2d at 217, and thus disregarded the legislative history and policy considerations which it conceded might support a different result. We believe the language of the statute is clear, but that the *Brennan* court's interpretation of it is erroneous.

Brennan's only discussion of the "subterfuge" clause in the statute is as follows:

> Taft's "Plan" was effectuated far in advance of the enactment of the law, eliminating any notion that it was adopted as a subterfuge for evasion. 500 F.2d at 215.

We find this statement unconvincing because what is forbidden is not a subterfuge to evade the *Act*, but a subterfuge to evade the *purposes* of the Act. These purposes are clearly spelled out in 29 U. S. C. § 621(b), and speak to concerns older than the Act itself:

> It is . . . the purpose of this chapter to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.

(Continued from preceding page)

cert. denied, 419 U. S. 1009 (1974), did not deal with the issue presented here. The court explicitly stated: "We also decline to consider at this time the argument of amicus curiae . . . that the Act prohibits involuntary retirement pursuant to a pension plan before age 65. As noted in text, plaintiff did not take this position in the district court." 499 F. 2d at 51 n. 7.

Language in Hodgson v. American Hardware Mutual Ins. Co., 329 F. S. 225 (D. Minn. 1971), which tends to support United's position, is plainly dictum. The court stated at the outset of its opinion: "The parties agree that the Plan [is] a bona fide employee benefit plan within the meaning of . . . the Act." 329 F. S. at 227.

Steiner v. National League of Professional Baseball Clubs, 377 F. S. 945 (C. D. Cal. 1974), is contrary to our decision. But *Steiner* offers no analysis and relies heavily on the Secretary of Labor's regulation, 29 C. F. R. § 860.110, which is no longer relevant in light of the Secretary's present position. See note 4, *supra*.

The fourth case, Dunlop v. Hawaiian Tel. Co., ... F. S. .... (D. Hawaii, June 23, 1976), is discussed in n. 6, *infra*.

Thus, in order to qualify for the exemption, a plan must not be a subterfuge to evade the Act's purpose of prohibiting arbitrary age discrimination. Stated otherwise, there must be some reason other than age for a plan, or a provision of a plan, which discriminates between employees of different ages. At this stage of the proceedings, United has offered no non-arbitrary justification for the age 60 retirement provision in its plan.

Any other reading of the "subterfuge" clause would produce the absurd result that an employer could discharge an employee pursuant to a retirement plan for no reason other than age, but then could not refuse to rehire the presumptively otherwise-qualified individual, for 29 U. S. C. § 623(f)(2) explicitly provides that "no such employee benefit plan shall excuse the failure to hire any individual . . ." "[C]onceptually there is no difference between a mandatory retirement age of sixty-two and a refusal to hire anyone who is sixty-two years old." *Hodgson*, 329 F. S. at 229.

III.

The result we reach is fully consistent with the legislative history. While it is often said that resort to legislative history is inappropriate where the statute is clear on its face,

> when aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination.' United States v. American Trucking Assns., 310 U.S. 534, 543-44 (1940) (footnotes omitted), *quoted with approval in* Train v. Colorado Public Interest Research Group, Inc., ... U.S. ....., ... (No. 74-1270, June 1, 1976).

The joint House-Senate report on the section of the age discrimination bill that was to become 29 U. S. C. § 623(f)(2) states:

> It is important to note that exception (3) applies to new and existing employee benefit plans, and to both the establishment and maintenance of such plans. This exception serves to empasize the primary purpose of the bill—

> hiring of older workers—by permitting employment without necessarily including such workers in employee benefit plans. H. R. Rep. 805, 90th Cong., 1st Sess., 2 U.S. Code Cong. & Adm. News, 2213, 2217.

Thus, Congress in drafting the exemption was concerned that requiring equal participation in employee benefit plans by newly-hired older workers could discourage the employment of such workers, since their age would not permit them to accumulate the years of service necessary to make participation in the plans economically feasible. The fact that the exemption contains the proviso "that no such employee benefit plan shall excuse the failure to *hire* any individual" (emphasis added) confirms that Congress was addressing itself to the problem of the worker hired later in his career, and did not intend to validate plans which discriminate on the basis of age against employees such as McCann who have "earned" their benefits through many years of plan membership.

Although we conclude from the legislative history that Congress did not intend retirement plan provisions ever to excuse the failure to hire *or the discharge* of any individual, but only to permit exclusion of some workers *from the plan* on the basis of age where exclusion is justified by economic considerations, we recognize that the statute as drafted does permit an employer to discharge employees "to observe the terms of" a plan. However, as we have already observed, in order to escape condemnation as a "subterfuge," an early retirement provision must have some economic or business purpose other than arbitrary age discrimination.

At oral argument, United's counsel conceded that if its plan, with its involuntary early retirement provision, were adopted now, it would probably violate the Act. Thus, its position is that the plan is immunized because it predates the Act. United rests on the *Brennan* court's conclusion that any action required by a plan predating the Act is valid, since such a plan could never be a subterfuge. While we have already pointed out the fallacy

in this reasoning, it is also refuted by the legislative history. The report states that the exemption "applies to new and existing employee benefit plans, and to both the establishment and maintenance of such plans." It is difficult to reconcile this language with a construction of the statute which would treat new and existing plans *differently*, automatically validating the provisions of existing plans by refusing to inquire into their purpose. In addition, the legislative history makes it clear that the *maintenance* of a discriminatory plan is to be considered independently under the exemption. To avail himself of the exemption, an employer must demonstrate that a plan is not being *maintained* as a subterfuge to evade the Act, as well as showing benign establishment, in order to prevail. United has offered no justification for maintaining its early retirement provision after the Act became effective.[6]

Our reading of the statute and its legislative history is a realistic one. There are over eleven million employees who are members of retirement plans which require retirement before age 65; there are another several million who are members of plans which permit forced retirement before 65.[7] We think it

6. *Brennan's* conclusion that the subterfuge clause automatically validates the provisions of all pre-Act plans was rejected in Dunlop v. Hawaiian Tel. Co., note 5, *supra*, for much the same reason we discuss in the text. However, the *Dunlop* court upheld a plan permitting involuntary retirement at age 60, based upon an admittedly disingenuous reading of the word "subterfuge" to mean a scheme to retire employees early without payment of substantial benefits. The court felt compelled to reach this result in order to give effect to the Secretary of Labor's interpretative regulation, 29 C. F. R. § 860.110, discussed in note 4, *supra*, which it presumed to mirror congressional intent. The court nevertheless observed that Congress might have intended to allow the exclusion of the aged from a retirement plan but not permit the discharge of aged individuals pursuant to a plan, as we have concluded, in which case "subterffuge" could be given its normal meaning. Apparently the *Dunlop* court did not have the benefit of the Secretary's revised position. Accordingly, to the extent that *Dunlop* relied on the regulation, its authority is weakened.

7. *See* U. S. Dept. of Labor, Monthly Labor Review, Vol. 69, No. 4, p. 41 (April 1973).

unlikely that Congress intended to leave the vast loophole in this broad remedial legislation which United would have us fashion. We can foresee no pernicious effects on the nation's employee benefit plans from our decision. Ordinarily, postponement of retirement results in cost savings to a plan providing retirement benefits.[8] If legitimate considerations other than an employer's preference for youth justify the forced retirement of employees before age 65, 29 U. S. C. § 623(f)(2), as we construe it, permits such action.

REVERSED AND REMANDED.

8. Savings come from two sources. Mortality before retirement eliminates or reduces the benefits payable. In addition, the higher retirement age shortens the period during which benefits will be paid to retirees. M. Bernstein, The Future of Private Pensions, 226 (1964).

STATUTE.

Sections 4(a) and 4(f) of the Age Discrimination in Employment Act of 1967

"Section 4(a) [29 U. S. C. § 623(a)]: It shall be unlawful for an employer—

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this Act."

"Section 4(f) [29 U. S. C. § 623(f)]: It shall not be unlawful for an employer, employment agency, or labor organization—

(1) to take any action otherwise prohibited under subsection (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age;

(2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this Act, except that no such employee benefit plan shall excuse the failure to hire any individual; or

(3) to discharge or otherwise discipline an individual for good cause."

INTERPRETIVE REGULATION OF WAGE-HOUR ADMINISTRATOR U. S. DEPARTMENT OF LABOR.

Title 29, CFR "LABOR", Chapter V "Wage and Hour Division, Department of Labor" Subchapter C,—"Age Discrimination in Employment" Part 860, Section 860.110.

"Sec. 860.110 INVOLUNTARY RETIREMENT BEFORE AGE 65.

(a) Section 4(f)(2) of the Act provides that 'It shall not be unlawful for an employer, employment agency, or labor organization * * * to observe the terms of * * * any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this Act, except that no such employee benefit plan shall excuse the failure to hire any individual * * *.' Thus, the Act authorizes involuntary retirement irrespective of age, provided that such retirement is pursuant to the terms of a retirement or pension plan meeting the requirements of section 4(f)(2). The fact that an employer may decide to permit certain employees to continue working beyond the age stipulated in the formal retirement program does not in and of itself, render an otherwise bona fide plan invalid insofar as the exception provided in section 4(f)(2) is concerned.

(b) This exception does not apply to the involuntary retirement before 65 of employees who are not participants in employer's retirement or pension program. It should be noted that section 5 of the Act directs the Secretary of Labor to undertake an appropriate study of institutional and other arrangements giving rise to involuntary retirement, and report his findings and any appropriate legislative recommendations to the President and to Congress."